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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 80-7

CARLA JABARA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BIRD AND MARELLA

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OPINION BELOW

The opinion of the Court of Appeals is not yet reported. A copy of the opinion is attached in our Appendix (App. A).

JURISDICTION

The jurisdiction of this Court is

invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the arrest of the Petitioner in her home without an arrest warrant violate Petitioner's Rights Under the Fourth Amendment of the United States Constitution.

2. Did the introduction of evidence seized in Petitioner's apartment and from the alley outside violate Petitioner's rights under the Fourth Amendment of the United States Constitution?

STATEMENT

1. PROCEEDINGS BELOW

On April 3, 1978, a Federal Grand Jury for the Central District of California returned an indictment charging Petitioner and six other defendants with conspiracy to possess with intent to distribute and to

distribute narcotics and with various substantive offenses [C.T. 1-13].[1/]

After hearings on numerous pretrial motions, trial commenced on November 2, 1978 before the Honorable Albert Lee Stephens, Chief United States District Judge [R.T. 697]. On December 11, 1978 the jury found all defendants guilty of all charges in the indictment [C.T. 621-26]. Thereafter, on January 8, 1979 the trial court granted one defendant's motion for judgment of acquittal as to Count One (conspiracy) [C.T. 728-29].

On January 22, 1979, Petitioner was sentenced by the Court on Counts One and Ten to the custody of the Attorney General for a period of five years

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1/ "C.T." refers to the Clerk's transcript on appeal to the Ninth Circuit Court of Appeals.

with a special parole term of three years [C.T. 673]. The sentences were ordered to run concurrently [C.T. 673].

Thereafter Petitioner filed a timely notice of appeal to the Ninth Circuit Court of Appeals. On April 4, 1980, the Ninth Circuit issued its opinion in United States v. Jabara, ____F.2d____, No. 79-1095, (9th Cir. April 4, 1980) (attached as Appendix A). By that opinion, the Ninth Circuit upheld the Petitioner's conviction.

On April 23, 1980 Petitioner filed a Petition for Rehearing and Suggestion for Rehearing In Banc. On June 5, 1980, the Ninth Circuit denied that Petition. Petitioner now files this Petition for Certiori before the United States Supreme Court.

2. STATEMENT OF FACTS

In April 1977, the Drug Enforcement Administration (DEA) in Los Angeles, began its investigation in this case [R.T. 705].[2/] During that investigation, and while acting in an undercover capacity, Agent John Jackson met Defendant Ella Hood [R.T. 704-705]. From April 1, to April 25 Agent Jackson had ten to fifteen conversations with Defendant Hood[3/] [R.T. 759]. He also went to dinner with Defendant Hood and lent her approximately $500 [R.T. 758, 887].

Agent Jackson tried to purchase narcotics from Defendant Hood [R.T.

2/ "R.T." refers to the Reporter's Transcript at trial.

3/ Agent Jackson testified that it was he who called Defendant Hood most of the time [R.T. 760].

707, 757]. On April 25, 1977, Hood introduced Agent Jackson to Defendant Rideout, at Rideout's residence on Wetherly Drive in Beverly Hills [R.T. 715, 716]. At that time, Jackson, Hood and Rideout discussed price and Jackson gave Hood $5,400 [R.T. 719]. Rideout later left her residence and went to an address on Burton Way in Beverly Hills [R.T. 815].[4/] She then returned to her residence on Wetherly Drive, making an intermediate stop at a gas station restroom [R.T. 816, 903, 909]. Rideout then delivered a quantity of heroin to Jackson [R.T. 732-33].

On April 27, 1977, Agent Jackson again met with Defendants Hood and Rideout at Rideout's residence [R.T.

4/ Defendant McClain was seen at 9315A Burton Way in Beverly Hills [R.T. 942-44].

735]. During that meeting, Agent Jackson received a sample of cocaine from Defendant Rideout [R.T. 738-41].

Starting on August 31, 1977, DEA agents intercepted and recorded telephone conversations on Defendant Rideout's telephone pursuant to a court authorized wiretap [R.T. 960-61]. The wiretap on one of the defendant's telephones lasted for an initial period of thirty days and was extended for an additional twenty days [R.T. 960-61]. Interceptions took place on another of Defendant Rideout's telephones over a thirty day period commencing on October 6, 1977 [R.T. 960-61]. In addition to the wiretaps, DEA agents conducted videotape surveillance of Defendant Rideout's residence. This was accomplished by setting up a command post in a hotel located near Defendant

Rideout's apartment [R.T. 1435].

On September 14, 1977, Agent Jackson contacted Defendant Hood and told her that he wanted to purchase approximately $15,000 worth of heroin [R.T. 741]. Later, on that same day, Jackson met Defendant Hood and gave her $15,000 [R.T. 743]. After meeting with Jackson, Hood went to Rideout's residence [R.T. 819-20]. At approximately 1:30 the following morning Hood returned the money to Agent Jackson; no narcotics were delivered [R.T. 745-46].

Agent John Peoples was contacted by Defendant Hood on September 16, 1977 [R.T. 822-29]. Peoples met with Hood later that day [R.T. 822-29]. After discussing price, Peoples gave Hood a total of $14,000 [R.T. 836]. They then drove to pick up Defendant Rideout and ultimately made their way to the corner

of Burton Way and Foothill Boulevard in Beverly Hills [R.T. 837-42]. Hood gave money to Rideout [R.T. 843]. Rideout returned to the van carrying a cookie box [R.T. 854]. Hood later gave the cookie box to Agent Peoples [R.T. 863]. It contained heroin [R.T. 863].

From approximately November 6, 1977, until March 8, 1978, there were no interviews conducted by agents in this investigation [R.T. 397-98]. During that time period the agents conducted no undercover activity in the case, nor did they contact any of the defendants [R.T. 397-98, 597, 626, 628, 630-31].

At some point before March 8, 1978, it was decided that the agents would re-establish contact with Defendant Rideout [R.T. 339]. It was also decided that Agent Jackson would

attempt to purchase narcotics from Rideout and arrest her upon delivery of the drugs [R.T. 401-403, 564].

Based upon this decision, Agent Jackson recontacted Defendant Rideout on March 8, 1978 [R.T. 1739-40]. Jackson told Rideout that he wanted to purchase heroin [R.T. 1741]. Between March 8 and March 20, Agent Jackson had approximately ten or twelve conversations with Defendant Rideout during which they carried on negotiations [R.T. 1742-43]. These negotiations were finalized on March 20 when Agent Jackson met with Defendant Rideout and made arrangements for delivery of the narcotics [R.T. 1743, 1772]. Delivery had been scheduled for March 20 [R.T. 615], however, Rideout was unable to produce the narcotics at that time [R.T. 1776]. Jackson told Rideout that

he would contact her on the following day [R.T. 1777].

On March 21, 1978, Jackson had three or four conversations with Rideout and met with her [R.T. 1777-1778]. At their meeting, Rideout made a telephone call after which she and Jackson drove to the vicinity of St. Andrews Place and Venice Boulevard in Los Angeles [R.T. 1781-82]. There Jackson paid Rideout $5,200.00. Rideout left the vehicle and later returned and delivered narcotics to Agent Jackson [R.T. 1782-1783].

Several days before March 21, 1978, however, the Assistant United States Attorney in charge of the investigation and DEA agents had a meeting to discuss the arrest of suspects in this investigation [R.T. 477]. The attorney in charge was aware that if Defendant

Rideout delivered narcotics to Agent Jackson as a result of the ongoing negotiations she would be arrested [R.T. 403, 564]. Most importantly, the Assistant United States Attorney and the agents foresaw and anticipated that arrests of other defendants would occur after Rideout's [R.T. 404, 407, 564-65].

On March 20, while Agent Jackson was negotiating with Defendant Rideout, DEA agents conducted surveillance at Petitioner's apartment which was located at 304 S. Elm Drive, Beverly Hills [R.T. 571, 1860-61]. Agents observed Defendant McClain's automobile in the parking stall behind Petitioner's apartment building [R.T. 1861]. On that date, March 20, one DEA agent went to the manager of Petitioner's building and asked for a

key to Petitioner's apartment [R.T. 545-47]. The agent told the building manager that there was going to be an arrest that day or that evening [R.T. 548].[5/] He said that there might be a need to get into the apartment quickly and made reference to breaking the door down [R.T. 549]. The agent also asked to be admitted to an area near Petitioner's apartment. The manager admitted the agent to the vacant apartment next to Petitioner's [R.T. 547-550]. Later that day the agent returned the key to the building manager, and stated that the arrest would not be made that day [R.T. 550-52].

On March 21, 1978, after she

5/ The agents did not have an arrest warrant at the time these preparations were made, or at any other time.

delivered narcotics to Agent Jackson, Defendant Rideout was arrested at approximately 3:30-4:00 p.m. [R.T. 622, 1792].[6/] Shortly thereafter, Defendant Earl Moore was arrested as he left a building located at 2422 W. Venice Boulevard [R.T. 1845, 1983].

At approximately 9:40 p.m. on March 21, 1978, at least six DEA agents went to Petitioner's apartment to arrest her and Defendant John T. McClain [R.T. 511, 712A, 2364, 2379, 2380]. Upon being admitted to the apartment with guns drawn, the agents immediately arrested Petitioner and then arrested Defendant McClain in the kitchen area

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6/ The Respondent contended at the time of trial that the arrest of Defendant Rideout provided them with "exigent circumstances" that avoided the need to obtain an arrest warrant for Petitioner.

of the apartment [R.T. 2364]. Agents later seized a number of items from the apartment and discovered a quantity of cocaine located in a driveway outside Petitioner's apartment building, four stories beneath Petitioner's kitchen window [R.T. 2466]. The items from the apartment and the cocaine were introduced at time of trial.

Defendant Hood was arrested later in the evening of March 21, 1978, while she was in her residence [R.T. 1951]. No warrants were obtained for the arrest for any defendant, including Petitioner [R.T. 425, 434, 441].

ARGUMENT

I

The Arrest of Petitioner in her Home Without an Arrest Warrant Violated Petitioner's Rights Under the Fourth Amendment of the United States Constitution

In the case at bar Petitioner was

arrested in her home by federal narcotics agents, without the benefit of an arrest warrant. This arrest followed a lengthy criminal investigation. There were no exigent circumstances to justify such an arrest and therefore any evidence seized at the time of the arrest and introduced at time of trial was done so in violation of Petitioner's Fourth Amendment rights.

This Court recently held that "[i]t is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." Payton v. New York, ____U.S.____, (April 15, 1980). In numerous opinions of the Circuit Courts of Appeal, the arrest of an individual in his home without a warrant has been judged unconstitutional when put to the Fourth Amend-

ment's test. See United States v. Reed, 572 F.2d 412 (2nd Cir. 1978), cert. denied, 439 U.S. 913; United States v. Killebrew, 560 F.2d 729 (6th Cir. 1977); United States v. Shye, 492 F.2d 886 (6th Cir. 1974); United States v. Houle, 603 F.2d 1297 (8th Cir. 1979); United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978); Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1969).

The Circuit Courts have often recognized that a warrantless arrest of an individual in a residence, although unreasonable under the Fourth Amendment, may only be justified if a clear showing of exigent circumstances is proven by the government.[7/] United

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7/ This Court specifically reserved what type of emergency or dangerous (continued)

States v. Reed, supra; United States v. Jarvis, 560 F.2d 494 (2nd Cir. 1978); United States v. Calhoun, 542 F.2d 1094 (9th Cir.), cert. denied, sub. nom, Stephenson v. United States, 429 U.S. 1064 (1977); Dorman v. United States, supra; United States v. Prescott, supra. These cases, and many others, clearly indicate that despite the existence of statutory authority for a warrantless arrest,[8] such an arrest in a residence, absent exigent circumstances, is unconstitutional.

The principle, therefore, is well established that federal officers must

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7/ (continued)
situations described as "exigent circumstances" justifies a warrantless entry into a home for the purpose of arrest. Payton v. New York, supra.

8/ Warrantless arrests for narcotics offenses are authorized by Title 21, United States Code, §878.

obtain an arrest warrant, grounded on probable cause, prior to arresting an individual in a residence, Payton v. New York, supra; only clearly defined and limited exceptions to this rule can pass the test of constitutionality United States v. Prescott, supra. In the case at bar no valid exception exists.

The Ninth Circuit in its opinion affirming Petitioner's conviction held that there existed sufficient facts justifying a finding of exigent circumstances. Such facts, the Court ruled, negated the need for government agents to obtain a warrant. The Circuit Court below, however, misconstrued the facts supporting a claim of exigent circumstances. In the case at bar the evidence clearly demonstrates that there existed ample time for the agents

to obtain a warrant since they had anticipated Petitioner's arrest for a substantial period of time.

As more fully set out in the Statement of Facts, supra, the evidence shows that sometime prior to March 8, 1978, agents decided to recontact Defendant Rideout for the purpose of purchasing more narcotics from her.9/

9/ By March, 1978, the agents had been investigating this case for approximately one year. They had conducted a wiretap on Defendant Rideout's telephone and made at least two purchases of narcotics from her. All of this had been completed by November, 1977, after which nothing happened in the investigation until March 8, 1978. Agents conducted no investigation and received no information relating to Petitioner after November, 1977. Despite this period of inactivity in the investigation, agents did not attempt to obtain a warrant for Petitioner's arrest. This period of inactivity in the investigation weighs heavily against the existence of exigent circumstances. See United States v. Reed, supra.

The agents had decided by that time that when Defendant Rideout delivered narcotics to the undercover officers she would be arrested [R.T. 634-35]. The agents were fully aware that Defendant Rideout's arrest would trigger the arrests of all other defendants including Petitioner. Thus, there is no question from the facts in the record that agents expected to make arrests of other defendants in this case after they arrested Defendant Rideout.[10/]

Agent Peoples, who was a supervising agent, testified that the agents anticipated arresting the other defendants in this case after they arrested

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10/ The government's contention that defendant Rideout might cooperate with them was highly speculative and cannot be used as a justified criteria for avoiding the need for a warrant.

Defendant Rideout. He testified in part as follows:

> "Q. So would it be fair to say that you, being the agents in the case, were anticipating that further arrests would take place after Rideout delivered the narcotics to Agent Jackson?
>
> A. Yes."

Agent Thompson testified that the agents involved in this investigation had meetings during the week before Petitioner's arrest. According to Thompson, the arrests of the defendants in this case were discussed during those meetings [R.T. 475-77].

That the agents planned to arrest Petitioner is clear from the fact that on March 20, 1978, one day prior to her arrest, agents had Petitioner's apartment under surveillance. On that date an agent went to the manager of Petitioner's apartment building and

requested and obtained a key to Petitioner's apartment.[11/] The agent told the apartment manager that there was going to be an arrest that day [R.T. 547-48]. The apartment manager let the agent into the vacant apartment next to Petitioner's where the agent waited with a two-way radio. Ultimately when Defendant Rideout failed to deliver narcotics to undercover officers on March 20, 1978, Petitioner's arrest was postponed and the agent left Petitioner's building and returned her apartment key to the building manager. However, on the following day, March 21, when Defendant Rideout delivered narcotics, the agents

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11/ In its Opinion, the Ninth Circuit incorrectly implies that the key which was obtained was for the apartment adjacent to Petitioner's (Appendix, p. 7).

implemented their plan to arrest the other defendants in the case including Petitioner.

From the above it is clear that as of March 8, 1978, agents expected to arrest Defendant Rideout, and they were fully aware that Rideout's arrest would trigger the arrests of other Defendants including Petitioner.[12/] Furthermore, on March 20, one day before Petitioner's arrest, agents took steps and positioned themselves to arrest Petitioner. They also advised Petitioner's apartment manager of the forthcoming arrest. Despite this, at no time did agents make any attempts to

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12/ Indeed, according to the Assistant United States Attorney, Defendant McClain's arrest was "the ultimate goal" and "the arrrest of Rideout was only regarded as a step in that investigation" [R.T. 402].

obtain a warrant for Petitioner's arrest.

Contrary to the Ninth Circuit's reasoning and conclusion, the agents took steps and made preparations to arrest Petitioner long before they knew whether or not Defendant Rideout would cooperate. It is certainly clear from this, if not from all else, that Defendant Rideout's cooperation was never a factor in the decision of when to arrest Petitioner.

It is equally apparent that, contrary to the holding of the Ninth Circuit, there was no danger of flight or destruction of evidence. Agents had Petitioner's apartment under surveillance starting on March 20, one day before her arrest. Surveillance clearly could have been maintained while a warrant was obtained with no

risk of flight or loss of evidence. See United States v. Calhoun, 542 F.2d 1094 (9th Cir.) cert. den. sub. nom., Stephenson v. United States, 429 U.S. 1064 (1977).

In light of the facts in the record that agents anticipated Petitioner's arrest and that there was ample time to obtain a warrant, the failure to obtain a warrant was unjustified. The record in this case amply demonstrates that the agents created their own "exigencies," and the Opinion of the Ninth Circuit effectively emasculates the warrant requirement by truly permitting the exception to swallow the rule. For this Court to uphold the ruling of the Ninth Circuit, it would be necessary to expand the concept of "exigent circumstances" to such a point that the entire meaning of the Payton decision

would be lost. This should not be the effect this Court intended in its Payton decision.

The term "exigent circumstances" as it relates to an arrest in a residence, refers to a situation in which the necessary delay involved in obtaining a warrant is outweighed by the need for immediate action under the circumstances of the particular case. United States v. Flickinger, 573 F.2d 1349, 1355 (9th Cir. 1978). The cases plainly hold, however, that the fact that there would be some delay caused by obtaining a warrant does not necessarily lead to the conclusion that exigent circumstances exist, since securing a warrant always entails some additional time. See Dorman v. United States, supra [citing Chappell v. United States, 342 F.2d 935, 938 n.5

(D.C. Cir. 1974)].

In this area, a number of circuits have repeatedly recognized that if a set of circumstances can reasonably be predicted or anticipated in advance, they cannot then be termed "exigent" such that will dispense with the need for a warrant. United States v. Calhoun, supra; United States v. Carriger, 541 F.2d 545 (6th Cir. 1976); Niro v. United States, 388 F.2d 535 (1st Cir. 1968). See also United States v. Santana, 427 U.S. 38, 48-49 (dissenting opinion of Marshall J.). There is a heavy burden on the government to show that there was a need to act without a warrant. Dorman v. United States, supra.

In determining whether or not exigent circumstances exist, all of the facts of the case must be considered.

United States v. Flickenger, supra. A number of circuits have adopted a set of factors which should be taken into account in making such a determination. These factors were first set forth in Dorman v. United States, and include the following: (1) whether the offense involved is violent in nature; (2) whether the suspect is reasonably believed to be armed; (3) whether there is a clear showing of probable cause to believe that the suspect committed the crime; (4) whether there is strong reason to believe that the suspect is in the premises to be entered; (5) whether there is a likelihood that the suspect will escape if not swiftly apprehended; and (6) the circumstances surrounding the entry. United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974); Dorman v. United States, supra;

United States v. Reed, supra; United States v. Campbell, 581 F.2d 22, 26 (2d Cir. 1978). The relevant factors as they apply to the facts of this case will be considered below.

First, the alleged crime involved in the instant case is conspiracy and possession with intent to distribute narcotics. Such offenses are certainly not crimes of violence. See United States v. Flickinger, supra at 1355; United States v. Phillips, supra. Moreover, there was absolutely no evidence to indicate that Petitioner, or anyone else in her apartment at the time of the arrest, was armed. In United States v. Flickenger, supra, the Ninth Circuit commented on this topic and stated:

> ". . . When the police do not have a reasonable basis for believing the

> suspect is armed beyond his alleged participation in nonviolent criminal activity, that fact alone is insufficient to demonstrate exigency."

United States v. Flickenger, supra, 573 F.2d at 1355.

Another factor to consider in determining whether exigent circumstances exist is the likelihood that the suspect will escape if not apprehended on the spot. See Warden v. Hayden, 387 U.S. 294 (1967). At the time of her arrest, Petitioner was in her apartment and there are no facts whatsoever that would indicate that she was preparing or likely to flee [R.T. 512]. Agents had Petitioner's residence under surveillance periodically for at least twenty-four hours before her arrest [R.T. 414-15, 545-48, 571, 860-612]. Moreover, at the time of her

arrest, there were at least four agents present in Petitioner's apartment and at least two more outside [R.T. 2379, 2380]. It is painfully apparent from this and other events that surveillance could have continued while a warrant was obtained.

In United States v. Calhoun, supra, the Ninth Circuit considered the circumstances surrounding the warrantless arrest of one Sheppard and observed:

> "While it is possible that Sheppard might have discovered the presence of the officers in the building and attempted to flee, nothing in the record indicates it was more likely here than in any case where there are two or more suspects and all are not arrested at once. The availability of an alternative further suggests that exigent circumstances did not exist. There were sufficient officers in the area that, instead of

> entry, they might have maintained surveillance while a warrant was sought."

United States v. Calhoun, supra, 542 F.2d at 1102 Accord: United States v. Flickinger, supra, 573 F.2d at 1355.

Similarly, there was no reason to believe that the time required to secure a warrant would result in the destruction of evidence. First of all, there was absolutely no reason to believe that there was any evidence in Petitioner's apartment at the time of her arrest. Throughout the entire investigation in this case in Los Angeles, there was no indication that Petitioner was involved with illegal narcotics. There was likewise no reason to believe that any evidence would be destroyed.

The circumstances surrounding the entry to effectuate the arrest are

another factor to consider. In the case at bar, at least six agents went to Petitioner's residence at approximately 9:35 p.m. [R.T. 511, 712A, 2364, 2379, 2380]. Agents knocked at Petitioner's door and with guns drawn arrested her as soon as she opened the door as she stood inside her apartment [R.T. 2364]. Such a substantial invasion at night, under color of authority cannot be termed "peaceful" and is tantamount to a forcible entry. See United States v. Davis, 327 F.2d 301, 304 (9th Cir. 1964).

Finally, the facts of the case as a whole including the circumstances surrounding the investigation, show that there were no exigent circumstances for the arrest of Petitioner. The facts show that agents received information from an informant regarding

Petitioner by January 12, 1977 [R.T. 466-468]. The agents kept this information for approximately fourteen months without developing any significant new information regarding Petitioner, and never during that fourteen month period sought an arrest warrant. The Los Angeles investigation in this case was actively underway by April 1977 and continued through October 1977. During that period, a wiretap was placed on two telephones, which wiretap ended by October 26, 1977 [R.T. 961]. During that period of the investigation, a total of three undercover narcotics purchases were made from various defendants in this case [R.T. 719, 732-733, 741, 743, 822-843, 854, 863]. Still, the agents failed to seek any arrest warrant for any defen-

dant, including Petitioner.[13/]

After the wiretap concluded, the investigation apparently became inactive for a four-month period until approximately March 8, 1978.[14/] It was not until March 1978 that agents recontacted Defendant Rideout and negotiated with her for the delivery of narcotics [R.T. 1739-43]. These negotiations extended from March 8 to March 20 and culminated in a delivery

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13/ Although agents are not bound to seek warrants as soon as they feel they have established probable cause (See United States v. Watson, 423 U.S. 411 (1976), their decision not to seek a warrant must be considered in determing whether or not an exigency in fact existed or whether an "exigency" was created by the actions of the officers. United States v. Calhoun, supra, at 1102.

14/ This period of inactivity in the investigation is a significant factor weighing heavily against the existence of exigent circumstances. See United States v. Reed, supra.

of narcotics and the arrest of Defendant Rideout [R.T. 622, 1742-1743, 1777-1783, 1792]. Despite the extended negotiations with Defendant Rideout and the agents' anticipation of Rideout's arrest, they sought no warrant for the arrest of Petitioner or any other defendant in the case [R.T. 425, 428, 565, 567-568]. Instead, by arresting Defendant Rideout, the agents set in motion a series of events which they could have foreseen would lead them to make a warrantless arrest of Petitioner in her residence.[15/] Certainly, it was entirely fore-

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15/ It had been decided prior to March 20, 1978 that when Rideout delivered narcotics to Agent Jackson she would be arrested [R.T. 564]. Moreover, the attorney in charge of the investigation, as well as the agents, anticipated that Rideout's arrest would precipitate other arrests [R.T. 405, 455, 565].

seeable that other arrests might follow Rideout's.

The facts clearly show that the agents knew they would arrest Petitioner after Rideout delivered narcotics. On the day before Petitioner's arrest, when Rideout was scheduled to deliver narcotics to Agent Jackson, a DEA agent went to Petitioner's building manager and obtained a key to Petitioner's partment [R.T. 545-547]. The agent told the building manager that an arrest would take place that day [R.T. 548]. It is apparent from these facts that, prior to the actual arrest on March 21, agents were carefully planning the circumstances for Petitioner's arrest. Despite the fact that agents knew that they planned to arrest Petitioner, they took no steps to obtain a warrant [R.T.

405-411, 545-550].

In light of the above facts, there was clearly no legitimate reason not to obtain an arrest warrant. See United States v. Calhoun, supra; United States v. Carriger, supra. The agents, by their actions, in effect created their own "exigencies." Such conduct has been condemned by a number of the Circuits as well as in Justice Marshall's dissenting opinion in United States v. Santana, supra. See United States v. Calhoun, supra; United States v. Curran; United States v. Carriger, supra; Niro v. United States, supra.

In United States v. Curran, supra, a circuit court evaluated a claim of exigent circumstances and stated:

> ". . . Although . . . [the agents] . . . intended to question the occupants, they contemplated a search and seizure. Knowing that

> marijuana was present and knowing that they would make their presence known to the occupants, the officers consciously established the condition which the government now points to as an exigent circumstance. If exigency arises because of unreasonable and deliberate delay by officers, it is not an exigent circumstance capable of dispensing with the requirement of a warrant."

United States v. Curran, supra, 498 F.2d at 34.

In the case at bar, the circumstances of Petitioner's arrest were entirely foreseeable to the agents and whatever exigencies existed were entirely created by their own actions. Therefore, the circumstances are not such that the requirements of a warrant can be ignored. Petitioner's arrest in her home at night without a warrant in the absence of exigent circumstances

violated the Fourth Amendment. The introduction of evidence seized under this illegal arrest should have been suppressed. Petitioner's convictions using such evidence was improper and should be reversed.

II

The Introduction of Evidence Seized in Petitioner's Apartment and from the Alley Outside Violated Petitioner's Rights Under the Fourth Amendment of the United States Constitution

Following the federal agents entry into Petitioner's home, a small amount of controlled substances, mannite, scales and other items were seized either pursuant to the "plain-view" doctrine or under an alleged consent. Additionally, an amount of cocaine was found several stories below Petitioner's apartment in the alley. All of this material was entered in evi-

dence against Petitioner.

As indicated above, the arrest of Petitioner in her home was without benefit of a warrant. Since there were no exigent circumstances to justify this improper arrest it was in violation of Petitioner's Fourth Amendment rights. Any evidence seized as a result of this unconstitutional incursion would be the fruit of the illegal act. Wong Sun v. United States, 371 U.S. 471, 484-487 (1963); Silverthorne v. United States; 251 U.S. 385, 391-392 (1920). See Dunnaway v. New York, ____ U.S.____, 99 S.Ct. 2248 (1979)--holding that an arrest of an individual in violation of his Fourth Amendment rights tainted and made inadmissible statements made by him.

Therefore, in the case at bar, the introduction into evidence of the items

seized within Petitioner's home was improper and should have been suppressed. The Ninth Circuit in its opinion held that the arrest was legal and therefore the material visible to the agents was admissible. As to the items later found on the premises, the Court below held that they were seized pursuant to a valid consent. However, as indicated above, the initial entry into Petitioner's home was unconstitutional since the agents did not possess a warrant. All of the materials seized on the premises were fruits of that initial illegal entry and therefore should have been suppressed.

As to the cocaine found outside the Petitioner's apartment, the Ninth Circuit held that it was abandoned property and therefore subject to seizure. However, as indicated above,

the entry into Petitioner's home was unconstitutional. As such, an item dispatched as a direct result of the agent's illegal entry is not abandoned and therefore not admissible at trial. Fletcher v. Wainwright, 399 F.2d 62, 64 (5th Cir. 1968); Massachusetts v. Painter, 368 F.2d 142 (1st cir. 1966); United States v. Merritt, 293 F.2d 742 (3rd cir. 1961).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

BIRD AND MARELLA

By: Vincent J. Marella
Attorneys for Petitioner
CARLA JABARA

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CARLA JABARA, JOHN T. McCLAIN, EARL MOORE, ELLA HOOD, EVELYN HATCH, CURTISTINE RIDEOUT, Defendants-Appellants.	Nos. 79-1095, 79-1118, 79-1225, 79-1272, 79-1304, 79-1355 OPINION D.C. No. CR 78-314-ALS F I L E D APR 2, 1980 Richard H. Deane Clerk, U.S. Court of Appeals

Appeal from the United States District Court for the Central District of California The Honorable Albert L. Stephens Jr., Presiding

Before: CHOY, HUG, and SKOPIL, Circuit Judges.

HUG, Circuit Judge:

This is a consolidated appeal from convictions on a ten-count indictment for narcotic offenses. All appellants were found guilty by the jury of

conspiring to possess with intent to distribute, and to sell and distribute, heroin, cocaine, methaqualone and marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The trial judge entered judgment on that count against all appellants, except Moore. As to Moore, the trial judge granted a motion for acquittal on the conspiracy count. All appellants except Hatch were convicted of various substantive counts for possession with intent to distribute and distribution of various narcotics.

FACTS

This case involves an extensive drug conspiracy, which operated from May 1974 until March 1978, centering in Southern California and extending to other states. Arrests followed an eleven-month investigation by agents

of the Drug Enforcement Administration (DEA). Wiretaps, purchases of drugs by undercover agents, and physical and video surveillance were the primary tools of investigation.

The Government characterized appellant John McClain as the primary source of the drugs; he was, however, well insulated from direct contact with purchasers. Appellant Carla Jabara acted as McClain's assistant; appellants Curtistine Rideout, Evelyn Hatch and Ella Hood were the "runners." They made the actual pickup of drugs and sales to purchasers. Appellant Earl Moore was described as a secondary distributor of drugs and was involved in transactions only when McClain was unavailable.

The DEA began its investigation in April 1977; DEA special agents, John

Jackson and John Peoples, negotiated with Hood and Rideout for the purchase of heroin. Sales of heroin took place on April 25, 1977 and September 16, 1977. In both transactions, undercover agents gave money to Hood to purchase heroin. Hood gave the money to Rideout, who proceeded to a house in Beverly Hills. McClain was observed at this house. Rideout returned with heroin and consummated the sale. One other attempted purchase in September 1977 failed when no narcotics were available.

Starting on August 31, 1977 DEA agents intercepted and recorded telephone conversations on Rideout's telephone pursuant to a court-authorized wiretap. The wiretap continued for fifty days. In October a thirty-day wiretap was placed on another of

Rideout's phones. In addition to the wiretaps, DEA agents also conducted videotape surveillance on Rideout's residence.

Evidence was introduced at trial that on September 21, 1977 Rideout made a telephone call to Alaska. The following day Wanda Mullins traveled from Alaska to Rideout's apartment. Surveillance agents observed Rideout leave her apartment, meet with Moore, and return home. After Rideout returned, Mullins boarded a plane for Alaska. When she arrived in Anchorage she was arrested, and a quantity of cocaine was seized from her.

From November 1977 until March 1978 DEA agents conducted no undercover activity in the case, nor did they contact any of the defendants. The Government contended, however, that

during this time it was analyzing approximately three thousand intercepted calls from the wiretaps on Rideout's phones.

In March 1978 DEA agents decided to reestablish contact with Rideout for the purpose of making another drug purchase. The DEA had determined, through the analysis of intercepted phone calls, that Rideout might cooperate and aid in the investigation if she were arrested. It was decided that if she sold a significant quantity of narcotics to an agent, she would be arrested. Based on this decision, agent Jackson began negotiating with her for the sale of heroin.

On March 20, 1978, as Jackson continued to work out a "deal" with Rideout, other DEA agents conducted surveillance on Jabara's apartment.

One agent met with the building manager and arranged to be admitted into an apartment adjacent to Jabara's apartment. The agent told the manager that an arrest might be made that night. Later, however, the agent returned the key and stated that no arrest would be made that day.

On March 21, Rideout was arrested shortly after she sold heroin to DEA agent Jackson. Rideout had obtained the drug from Moore, who was arrested the same day. Moore had in his possession some of the recorded funds that Jackson had paid to Rideout. Moore was advised of his rights, and signed a consent to search form. A search of his apartment turned up heroin, cocaine and lactose.

Rideout was not cooperative, as the agents had hoped, and she made

attempts to notify other defendants of her arrest. The DEA contacted a magistrate concerning arrest warrants for the other defendants but realized that it would require considerable time to prepare supporting affidavits, and that the other defendants might be warned in the meantime. Accordingly, an Assistant United States Attorney in charge of the investigation authorized that arrests be made without warrants.

At approximately 9:35 p.m. on March 21, agents knocked on Jabara's apartment and announced their presence. Upon being admitted to the apartment with guns drawn, the agents immediately arrested Jabara and McClain. Agents seized a number of items from the apartment, including nearly $55,000 in cash. A quantity of cocaine was discovered located in a driveway

outside the apartment, four stories beneath the apartment's kitchen window. Hood was arrested later that night. No arrest warrants were obtained for the arrest of any defendant.

Two days after the arrests, DEA agents obtained a search warrant for Jabara's other apartment. Cocaine, mannite, a scale and a heat sealer were seized in the search. Those items were introduced at the trial against all the defendants.

ARGUMENTS

The appellants raise thirteen principal assignments of error. We will relate additional pertinent facts in the discussion of each issue.

1. Jabara and Moore argue that their arrests were not based on probable cause. Carla Jabara argues that there was insufficient evidence

available to the arresting officer to establish probable cause. Jabara asserts three principal contentions as to why the evidence relied on by the Government did not establish probable cause for her arrest. First, she argues that the reliability of certain government informants was not demonstrated. Second, she argues that the information was stale, because the information allegedly concerned her conduct in 1975 and the arrest took place in 1978. Third, she notes that her voice was never intercepted in the wiretaps. All of Jabara's contentions are without merit. The reliability of the government informants was established by their declarations against penal interest. The information provided by Antoinette Griffin and Jeannine Collins implicated them in the

crime of violating federal narcotics laws. It is well-settled in this circuit that a declaration against penal interest meets the reliability test of Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969). See United States v. Damitz, 495 F.2d 50, 55 (9th Cir. 1974); United States v. Harris, 403 U.S. 573, 583-84 (1971). A review of the record also discloses that the information the Government relied on was not stale. While Jabara contends that all the information provided to the Government involved her alleged activities in 1975, the record clearly shows that the information concerned her activities in 1975 and 1977. Thus, the information was not three years old as Jabara asserts. While Jabara correctly contends that the wiretap

interceptions never recorded her voice, the fact that her voice was never intercepted does not negate the other evidence that established probable cause. Furthermore, a review of the record indicates that a wiretap interception did record conversations between Jabara's co-defendants which implicated her in the conspiracy. We conclude that there was probable cause to believe that Jabara was involved in a conspiracy to violate federal narcotics laws. See United States v. Watson, 423 U.S. 411, 431 n.4 (1976).

Moore also contends that there was not probable cause to arrest him for participation in any illegal drug activity. Moore further contends that prior to his arrest the officers reached into his pocket and pulled out

a large sum of money, which constituted an unreasonable warrantless search. A review of the record demonstrates that there was probable cause to arrest Moore for conspiracy to violate federal narcotics laws. See id. The record also indicates that the search of Moore's pocket was incident to the arrest. See United States v. Chatman, 573 F.2d 565, 567 (9th Cir. 1977).

2. Both McClain and Jabara contend that exigent circumstances did not exist at the time of their warrantless arrests at Jabara's residence at 304 S. Elm Drive, Beverly Hills. The rule is well-settled in this circuit that "absent exigent circumstances, police who have probable cause to arrest a felony suspect must obtain a warrant before entering a dwelling to carry out the arrest." United States v.

Prescott, 581 F.2d 1343, 1350 (9th Cir. 1978)(footnote omitted). In the instant case the agents did not have arrest warrants for Jabara or McClain at the time of their arrests. Because the arrests took place at Jabara's residence, the Government must establish exigent circumstances in order for the arrests to be justified under the Fourth Amendment.

The Government asserts that once Rideout had been arrested, there was a danger that her arrest might precipitate the flight of McClain and Jabara and the destruction of evidence. Because of intercepted statements of Rideout the Government had reasonably anticipated that Rideout would be willing to cooperate with the Government in building its case against the other defendants; however, Rideout

proved unwilling to cooperate and her conduct also indicated that she would attempt to notify various co-conspirators of her arrest. It was reasonable to conclude that the affidavits to support arrests of the principal conspirators identified in the investigation could not have been prepared in time to avert the flight or destruction of evidence. The trial court, predicating its finding on the possibility of both flight and destruction of the evidence, held that there were exigent circumstances justifying the warrantless arrests at Jabara's residence. The probability of destruction of evidence and flight do constitute exigent circumstances. See United States v. Flickinger, 573 F.2d at 1349, 1356 (9th Cir.), cert. denied, 439 U.S. 836 (1978); United States v. Curran,

498 F.2d 30, 35-36 (9th Cir. 1974); United States v. Evans, 481 F.2d 990, 993 (9th Cir. 1973). We conclude that the trial court's finding was not clearly erroneous; we affirm the finding. United States v. Flickinger, 573 F.2d at 1357.

3. Both Jabara and McClain contend that all the evidence seized at Jabara's South Elm Drive residence following the arrest should have been suppressed. They first argue that exigent circumstances did not exist to justify their warrantless arrests and that the evidence should be suppressed on that ground. For the reasons discussed above, we find no merit in this contention.

Jabara and McClain also contend that the evidence the Government justified seizing on grounds of plain

view, abandonment, and consent should have been suppressed. We conclude that the seizure of the package containing cocaine and the small tray that were discovered in the open drawer of the night table was justified under the plain view doctrine. See Harris v. United States, 390 U.S. 234, 236 (1968); Musgrove v. Eyman, 435 F.2d 1235, 1238 (9th Cir. 1971). The seizure of the shopping bag containing over ten pounds of cocaine and heroin, which had been dropped out the window of the Jabara residence, was justified on the theory of abandonment. See United States v. Wilson, 472 F.2d 901, (9th Cir.), cert. denied, 414 U.S. 868 (1973).

Jabara and McClain argue that they did not voluntarily consent to the search of the premises and conclude

that the evidence seized pursuant to the purported consent search should have been suppressed. The trial court held that Jabara and McClain voluntarily consented to the search. We must apply the "totality of the circumstances" test set forth in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), to determine whether the trial court's determination that Jabara and McClain voluntarily consented to the search was clearly erroneous. United States v. Calhoun, 542 F.2d 1094, 1100-02 (9th Cir. 1976), cert. denied, 429 U.S. 1064 (1977). Jabara and McClain were given their Miranda warnings and both signed formal consent search forms which explicitly stated that they understood that any evidence, found as a result of the search, could and would be used against them in any civil or criminal

proceedings. In addition, shortly after McClain's arrest, prior to the execution of the formal consent search form, McClain stated that he wanted the agents to search the premises and "get it over with." We conclude that the trial court's finding of voluntary consent cannot be set aside under the clearly erroneous standard.

4. Moore argues that the trial court erred in finding that he consented to the search of his apartment. After he was given his Miranda warnings, Moore signed a consent search form. Viewing the "totality of the circumstances," we find that the trial court correctly determined that Moore consented to the search. See id.

5. Both Jabara and McClain assert that Agent Jackson's affidavit, which supported the search warrant for

Jabara's other residence located at 7767 Hollywood Boulevard, apartment 306, contained four material misrepresentations of fact and that these misrepresentations of fact served to vitiate the warrant. They therefore conclude that all the evidence seized pursuant to the warrant should have been suppressed under the Fourth Amendment. Additionally, Jabara and McClain argue that once the misrepresentations are excized from the affidavit, as required by Franks v. Delaware, 438 U.S. 154 (1978), the affidavit fails to establish probable cause that they were part of a conspiracy or that facts or instrumentalities could be found in the apartment.

At the outset, we note that McClain concedes in his brief that "he had absolutely nothing to do with the

[Hollywood Boulevard] apartment." Therefore, McClain could not challenge the evidence seized at the Hollywood Boulevard apartment, because he had no legitimate expectation of privacy in the premises. See Rakas v. Illinois, 439 U.S. 128 (1978); Scharf v. United States Attorney General, 597 F.2d 1240, 1244 (9th Cir. 1979); United States v. Culbert, 595 F.2d 481, 482 (9th Cir. 1979)(per curiam).

If a defendant can establish that a warrant affidavit contains (1) a statement or statements that are either deliberate falsehoods or made with reckless disregard for their truth and (2) the court finds that the challenged material is necessary to a finding of probable cause, then the warrant must be voided. See Franks v. Delaware, 438 U.S. 154, 171-172 (1978); United States

v. Young Buffalo, 591 F.2d 506, 508-12 (9th Cir.), cert. denied, 441 U.S. 950 (1979). In the instant matter, the trial court held that the four alleged misstatements were not intentional misrepresentations, and that even after excising the four alleged misstatements, the affidavit was sufficient to establish probable cause. Upon reviewing the record it is apparent the errors were minor and unintentional. The findings of the trial court are well supported by the evidence and we conclude that the search warrant was validly issued. See Franks v. Delaware, 438 U.S. at 171-172; United States v. Young Buffalo, 591 F.2d at 508-12. The evidence seized at the Hollywood Boulevard apartment was properly admitted into evidence.

6. Both McClain and Jabara argue

6. Both McClain and Jabara argue that the evidence seized at the Hollywood Boulevard apartment should have been excluded as being irrelevant and unduly prejudicial. The evidence in question consisted of quantities of cocaine and mannite, a scale and a heat sealer. McClain and Jabara fail to demonstrate how evidence of narcotics and narcotics paraphernalia are irrelevant in a narcotics conspiracy case. The evidence was properly found to be relevant. Fed. R. Evid. 401. Under the circumstances, the evidence was not unduly prejudicial and the trial court did not abuse its discretion in admitting the evidence. See United States v. Watkins, 600 F.2d 201, 204 (9th Cir. 1979).

7. Jabara, McClain, Moore, Hatch and Rideout argue that the wiretaps

were unlawful.

(a) Standing

The trial court specifically found that "defendant Jabara lacks standing to challenge the validity of the wire intercepts because she [was] not an 'aggrieved person' within the meaning of 18 U.S.C. § 2518(10)(a)." Because Jabara has failed to establish that she was a party to an intercepted conversation or that an intercepted conversation occurred on her premises, the finding of the trial court was correct. See United States v. Calhoun, 542 F.2d 1094, 1097-98, (9th Cir. 1976).

(b) The Affidavits

McClain, Rideout, Hatch, and Moore argue that the Government failed to meet the necessity requirements of 18 U.S.C. § 2518(1)(c) in their applica-

tions for the wiretap authorizations. They contend that the Government had adequate alternative means to obtain the evidence and information it desired. They therefore contend that all evidence obtained through the two wiretaps should have been suppressed.

Section 2518(1)(c) requires the following:

> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

In the Government's applications for the wiretap authorizations, the Government did submit affidavits by Agent Jackson to satisfy section 2518(1)(c). Based on these affidavits, the trial court held that the "use of traditional investigative procedures, exclusively,

would have been likely to jeopardize the outcome of the investigation, and that under all the circumstances presented by this scheme wiretaps were essential." We have reviewed the affidavits of Agent Jackson and conclude that the trial court correctly ruled, in accordance with section 2518(1)(c), that the use of traditional investigative procedures would have been too dangerous.

(c) The Second Wiretap Authorization.

McClain, Rideout, Hatch, and Moore argue that the second wiretap application was improper. Attorney General Griffin Bell, pursuant to 18 U.S.C. § 2516, has specifically authorized the Assistant Attorney General in charge of the Criminal Division (Benjamin Civiletti), and the Assistant Attorney

General in charge of the Office of Legal Counsel (John M. Harmon) to authorize applications to federal judges for wire intercepts. The second wiretap authorization was made by John Harmon, Assistant Attorney General of the Office of Legal Counsel. Defendants correctly assert that the Attorney General's order conditioned Mr. Harmon's power to authorize the wiretap application on Mr. Civiletti's absence from the District of Columbia or on his unavailability. From this point they argue that the Government has the burden of proof of establishing Mr. Civiletti's unavailability, as a condition precedent to Harmon's exercise of that power. They further contend that in the absence of some affirmative showing that Mr. Civiletti was unavailable to authorize

the wiretap applications, no presumption of regularity is entitled to be granted to Mr. Harmon's signature.

The defendant has the initial burden of establishing a prima facie showing that the condition precedent has not been met in order to challenge the wiretap. Because authorization orders are presumed to be proper, see United States v. Feldman, 535 F.2d 1175, 1180-81 (9th Cir.), cert. denied, 429 U.S. 940 (1976); United States v. Turner, 528 F.2d 143, 151 (9th Cir.), cert. denied, 423 U.S. 996 (1975), the condition precedent in the instant case is presumed to have been met. The defendants have offered no evidence, aside from their own conjecture and speculation, to rebut this presumption. Absent some affirmative showing by the defendants that the authorization

application was not properly authorized, we will not invalidate the wiretap order, which was otherwise properly issued. Cf United States v. De La Fuente, 548 F.2d 528, 531-37 (5th Cir.), cert. denied, 431 U.S. 932 (1977)(where the court rejected the defendants' argument that the Government must authenticate the Attorney General's signature on an authorization order as a predicate to the use of the wiretap evidence).

8. McClain, Rideout, and Jabara argue that the evidence adduced at trial was insufficient to prove the single overall conspiracy charged in the indictment. They contend that the evidence proved several separate and independent conspiracies not charged in the indictment. McClain, Rideout, and Jabara also assert that they were

deprived of their right to a fair trial because a severance of trials should have been granted, and that there was a fatal variance between the proof adduced at trial and the crime charged in the complaint. Their arguments of severance, misjoinder, and variance are simply a restatement of their basic contention that the evidence adduced at trial proved several separate and independent conspiracies and not the single overall conspiracy charged in the indictment. Hatch argues that while the evidence adduced at trial may have been sufficient to prove her guilty of a separate conspiracy, the evidence failed to establish that she was a member of the main conspiracy charged in the indictment. The issue is whether the evidence adduced at trial proved that McClain, Rideout,

Jabara, and Hatch were members of the single overall conspiracy charged in the complaint.

The essence of the defendants' argument is that there were six separate and independent acts or activities proved at trial all of which constituted six separate conspiracies. According to the defendants these six separate conspiracies were separated by time, persons, places, and overt acts. In United States v. Kearney, 560 F.2d 1358, 1362 (9th Cir.) cert. denied, 434 U.S. 971 (1977), this circuit rejected a similar contention, stating:

> "Appellants assert that the Government swept several discrete conspiracies into a single conspiracy count, and that this was a misjoinder which worked to their prejudice, effecting "guilt transference" by associating them with

> co-defendants involved in other crimnal acts. In so contending, appellants confuse separate acts at separate times with separate conspiracies. Almost any venture, criminal or legitimate, is analyzable into a series of bits, each of which, in turn, is characterizable as an independent plan or goal. The standard for determining the existence of a single conspiracy, however,
>
> > ". . . is whether there was one overall agreement among the various parties to perform various functions in order to carry out the objective of the conspiracy . . . ." (Emphasis in original).

It is sufficient for the Government to prove that each defendant knew, or had reason to know, that others were involved in a broad project for illegal distribution of narcotics, and that his or her benefits were probably dependent upon the success of the entire opera-

tion, id. at 1362. "Proof that an alleged co-conspirator knew that he was plotting in concert with others to violate the law is sufficient to raise the necessary inference that he [or she] joined in the overall agreement . . . . It need not even be shown that an alleged co-conspirator knew all of the purposes of and all of the participants in the conspiracy." Id. Viewing the evidence in the light most favorable to the Government, Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Rich, 580 F.2d 929, 934 (9th Cir.), cert. denied, 439 U.S. 935 (1978), and drawing all reasonable inferences from the evidence in favor of the Government, United States v. Winn, 577 F.2d 86, 91 (9th Cir. 1978), we conclude that the evidence was sufficient to establish the existence

of a single conspiracy.

Once the existence of a conspiracy is established, "evidence establishing beyond a reasonable doubt a connection of a defendant with the conspiracy, even though the connection is slight, is sufficient to convict him with knowing participation in the conspiracy." United States v. Dunn, 564 F.2d 348, 357 (9th Cir. 1977) (emphasis in original). A review of the evidence clearly establishes a connection between these appellants and the conspiracy. Thus, the evidence was sufficient to prove that McClain, Rideout, Jabara and Hatch were members of the conspiracy charged in the indictment.

9. Moore contends that court erred in denying his motion to sever his trial from the other defendants. The

trial court granted Moore's motion for judgment of acquittal on the conspiracy charge, but Moore still stands convicted on four counts of aiding and abetting Rideout in the possession of and distribution of cocaine and heroin. Moore contends that he was prejudiced by the trial court's failure to sever his trial from that of the other defendants.

The trial court found that joinder was proper under Fed. R. Crim. P. 8(b), which provides that joinder of defendants is proper when the parties are alleged to have participated "in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." The court noted further that the proof against each of the defendants would "involve substantial portions of proof

against the co-defendants and that none of the defendants [would] be prejudiced by a joint trial." Moore was charged with conspiracy and other acts which involve allegations that he participated with the other defendants in the same act or transactions or in the same series of acts or transactions. "The trial judge has broad discretion under Rule 14, Fed. R. Crim. P., to grant or deny motions for severance, and denial of such a motion will be reversed only after an appellant has met the heavy burden of showing the trial judge abused that discretion." United States v. Ortiz, 603 F.2d 76, 78 (9th Cir. 1979). Upon review of the ruling in light of the evidence we find no abuse of discretion.

10. Moore argues that the prosecutor's comment on his failure to

produce a witness deprived him of a fair trial. In closing argument, the prosecutor commented on the fact that the jury had heard no testimony from an unnamed man who a witness claimed gave money to Moore prior to his arrest on March 21, 1978. Moore's trial counsel objected to the prosecutor's comment and moved for a mistrial. The trial court denied the motion for mistrial, instructed the prosecutor not to comment on that issue, and immediately instructed the jury that Moore had no obligation to produce any evidence. Moore argues, without merit, that the prosecutor's comment deprived him of his right to a fair trial. The prosecutor's comment did not involve privileged testimony or a comment upon excluded evidence and was not error. See United States v. Nace, 561 F.2d

763, 770 (9th Cir. 1977).

11. Hood contends that the trial court erred when it refused to give an entrapment instruction on her behalf. The defense of entrapment consists of two elements: (1) Government agents must induce the defendant to commit the offense; and (2) the defendant's predisposition must be such that he is not ready and willing to commit the offense on any propitious opportunity. United States v. Glaeser, 550 F.2d 483, 486-87 (9th Cir. 1977). The record reveals that the conduct of the agents, at most, amounted to assistance in the commission of the crime, which is insufficient to show entrapment. See United States v. Ratcliffe, 550 F.2d 431, 434 (9th Cir. 1976). In addition, Hood was clearly predisposed to commit the crime. She had a prior federal

conviction for possession of heroin with intent to distribute; she was familiar with the code words used in the narcotics transactions; she never once rejected outright any involvement in the narcotics deals; she negotiated the best price for the sale of narcotics to undercover agents, accepted cash for her services in the narcotics transactions, and she dealt with two undercover agents over the course of a year. Thus, Hood did not meet her preliminary burden of establishing that she was induced to commit the crime and that she was not predisposed to commit the crime. See United States v. Hermosillo-Nanez, 545 F.2d 1230, 1232 (9th Cir. 1976); cert. denied, 429 U.S. 1050 (1977).

When the evidence presents no genuine dispute as to whether the

defendant was entrapped, there is no factual issue for the jury, and the judge has a duty to rule on the defense as a matter of law. Glaeser, 550 F.2d at 487. Under the circumstances of this case, there was no factual issue for the jury and the trial court correctly ruled that, as a matter of law, Hood was not entrapped.

12. Jabara argues that the trial court erred in admitting irrelevant and improper character evidence showing that she was not gainfully employed. This evidence created the reasonable inference that Jabara's unexplained wealth came from the narcotics conspiracy, which is relevant in a narcotics conspiracy case. See United States v. Tramunti, 513 F.2d 1087, 1105 (2nd Cir.) cert. denied, 423 U.S. 832 (1975). It was not admitted to show

conduct in conformance with a character trait, but rather to show the likelihood that she received funds from the narcotics conspiracy. The trial court properly admitted the evidence.

13. Rideout contends that there was insufficient evidence to convict her on Counts VI and VII of the indictment, involving possession and distribution of four ounces of cocaine on September 22, 1977. The concurrent sentence doctrine makes it unnecessary for us to consider Rideout's contention, because she stands convicted on seven other counts upon which she was sentenced to terms of imprisonment that are equal to, and run concurrent with, the terms of imprisonment imposed for Counts VI and VII. See United States v. Romano, 382 U.S. 136, 138 (1965); Barnes v. United States, 412 U.S. 837, 848 n.16

(1973); Jordan v. United States, 416 F.2d 338, 346 (9th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

The Government argues that the trial court erred in granting Moore's motion for judgment of acquittal as to the conspiracy charge. We uphold the ruling of the trial court that, viewing the evidence in the light most favorable to the Government, the evidence does not support a rational conclusion that Moore was guilty beyond a reasonable doubt of the conspiracy charge. See United States v. Ramos, 558 F.2d 545, 546-47 (9th Cir. 1977); United States v. Rojas, 554 F.2d 938, 943 (9th Cir. 1977). We thus affirm the trial court on this issue.

AFFIRMED